# No. 21180

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

C. H. LEAVELL & COMPANY, a Texas corporation, and RIVER CONSTRUCTION CORPORATION, a Delaware corporation, a Joint Venture, and ALLISON STEEL MANUFACTURING CO., an Arizona corporation,

Appellants,

vs.

FIREMAN'S FUND INSURANCE COMPANY, a California corporation,

Appellee.

Appeal from the United States District Court for the District of Arizona

APPELLANTS' REPLY BRIEF

MARK WILMER
SNELL & WILMER
Attorneys for Appellants

## CITATIONS

## CASES

# No. 21180

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

| | |
|---|---|
| C. H. LEAVELL & COMPANY, a Texas corporation, and RIVER CONSTRUCTION CORPORATION, a Delaware corporation, a Joint Venture, and ALLISON STEEL MANUFACTURING CO., an Arizona corporation,<br>Appellants,<br>vs.<br>FIREMAN'S FUND INSURANCE COMPANY, a California corporation,<br>Appellee. | Appeal from the United States District Court for the District of Arizona |

## APPELLANTS' REPLY BRIEF

The suggestion made by appellee that appellants' fact statement is "somewhat less than candid" may come within some oblique application of the rationale of the rule of *New York Times Co v. Sullivan,* 375 US 254, 84 S Ct 710, 11 L ed 2d 686 (1964) as "uninhibited and robust debate." However, it would have been helpful if in fact appellants' bias induced a more optimistic view of the facts that the record warrants, appellee in justification of its imputation of chicanery to appellants, had cited book and verse to justify its unsupported assertion.

The net of appellee's responding argument is that the negli-

gence of Allison's employees, in "taking a chance" by using a hoisting block and tackle attached in a different manner to a different part of the tower from that directed by Allison, in lifting a wind boom cable constitutes a "change in method of construction," thereby voiding the policy coverage.

*There was no claim or showing that any responsible official of Allison knew of or authorized this shortcut. It could not therefore constitute a "change in method of construction" by Allison: at best it was an unauthorized shortcut by Allison's employees which certainly is one of the risks the contractor fears and insures against* — carelessness or other departure from the standard of care expected of its employees.

When appellee argues that the insurer was entitled to assume and rely upon the assumption that appropriate working plans and procedures would be outlined by Allison and that departure therefrom would void the policy coverage, appellee does assert what amounts to an absurdity. By like reasoning, since the plans and specifications require that the construction and work shall be done in a careful and workmanlike manner, the conclusion follows that any loss resulting from negligence on the part of an employee likewise does not come within the "all risks" coverage provided by appellee's policy of insurance.

Appellants have no apology to offer for their criticized assertion to the effect that if Allison elected to use 100 Chinese coolies hauling on a rope to raise material into place it was no concern of the insurer. Insurer made no inquiry as to, and received no assurances as to, what source of energy was to supply the power to erect any part of the structure.

We likewise offer no apologies for the balance of the criticized arguments for which appellants are taken to task at page 12 of Appellee's Brief.

We again say that for appellee to assert that working drawings

which appellee never saw or relied upon in considering if it desired to write the policy here sued upon or in computing the premium to be charged therefor are, in legal effect, written into and become part of a policy of insurance written, (probably before these drawings were even made) comes probably nearer to an absurdity than a mere approach.

The casualty which caused appellee's loss here sued for was caused by the inattention or disobedience of Allison's employees to Allison's orders as to how the task at hand should be accomplished. This may have been intentional and the result simply of the employees' desire to make use of a shortcut, thereby saving time and effort, or it may have been that in the stress of working in this isolated area, plans were not readily at hand or not too closely adhered to, but in any event, it is something which was not authorized by or known to Allison prior to the time the casualty occurred. We therefore say that to contend such a wrongful deviation by a workman from his employer's directions as to how a task should be performed can be considered a "change in method of construction" is, to say the least, lacking in substantial merit.

## *CONCLUSION*

The judgment below should be reversed with directions to enter judgment finding appellants are entitled to recover their losses attributable to the casualty described in Appellants' Complaint.

Respectfully submitted,

SNELL & WILMER

By Mark Wilmer
Attorneys for Appellants
400 Security Building
Phoenix, Arizona 85004

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

_____

Mark Wilmer